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No. 338

IN THE

United States Supreme Court

N. ALFRED WINN, PETITIONER

v.

THE FLORIDA BAR, RESPONDENT

On Petition for Certiorari to the
Supreme Court of Florida

BRIEF FOR RESPONDENT

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BRIEF IN OPPOSITION FOR RESPONDENT

QUESTION PRESENTED

Was petitioner, a Florida attorney, denied the privilege against self-incrimination guaranteed by the Fourteenth Amendment when, over a general objection by his counsel which did not specify constitutional grounds, (a) he was called as a witness in a disciplinary proceeding inquiring into his professional conduct; (b) he testified at length without further objection concerning charges against him based on conduct which was not criminal under Florida or federal law, and; (c) he did not raise the question of privilege in his petition for review, his brief or the oral argument of his counsel in the Supreme Court of Florida.

STATEMENT OF THE CASE

The statement of the case in the petition fails to describe the proceedings out of which petitioner's claim of privilege

arises. An understanding of those proceedings is necessary to evaluate petitioner's claim.

On July 27, 1967, The Florida Bar[1] filed a complaint in two counts in the Supreme Court of Florida (R-1)[2] charging petitioner with unprofessional conduct. The first count (as later amended) charged petitioner with undertaking extensive, unproductive and ill-considered litigation on behalf of a client, with charging her exorbitant fees, with failing to account to her for sums received on her behalf, and with failing to advise the court before which the proceedings in which he was representing her were pending that she had been adjudged incompetent. The second count (as later amended) charged petitioner with entering into a contingent fee contract with another client[3] by which he had agreed to represent her in a divorce case for a fee equal to half the property recovered in the proceeding, and under which he received $2,000, representing half the value of real property to which she succeeded by operation of law when her husband died while the proceedings were pending.

Neither count charged petitioner with criminal conduct.

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[1]The Florida Bar is a corporate body created by and existing under the authority of the Supreme Court of Florida. All lawyers in Florida are required to be members. The Bar has been charged by the Supreme Court of Florida with the maintenance of professional standards in the practice of law. To that end, it has been vested as an official arm of the Court with the powers and authority described in the Integration Rule of The Florida Bar. The Integration Rule is reproduced in 32 Fla. Stat. Ann., pp. 497, et seq.

[2]"R" denotes numbers in the index to the Record prepared by the Supreme Court of Florida. "T" denotes page numbers in the transcript of testimony, R-11, 12 and 13.

[3]By rule of decision in Florida, contingent fee contracts in divorce cases are against public policy and unenforcible. *Sobieski* v. *Maresco*, (Fla. App. 1962) 143 So.2d 62. But the existence of such a contract does not preclude an attorney from recovering a reasonable fee. *Salter* v. *St. Jean*, (Fla. App. 1965) 170 So.2d 94.

At the hearing before the referee,[4] Bar counsel called petitioner as a witness under Rule 11.06(7) of the Integration Rule of The Florida Bar,[5] and under the adverse witness rule in the Florida Rules of Civil Procedure.[6] Petitioner's counsel made a general objection which did not specify any constitutional grounds, state or federal (T-Vol. II, p. 2). The referee overruled the objection.[7] Petitioner then took the stand and, without further objection, testified at length concerning the facts underlying the charges (T-Vol. II, 2-137, Vol. III, 134-155, 161-165). None of the testimony which petitioner gave revealed any criminal conduct on his part.

The referee filed a report (R-4) finding that, as to count one, petitioner was guilty of unprofessional conduct in failing to disclose to the court that his client was incompetent. As to count two, the referee found petitioner

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[4]Under Article 11 of the Integration Rule, the trial of a case involving charges of professional misconduct against a lawyer is held before a referee appointed from a panel certified by the Supreme Court of Florida. The rule describes the proceedings as being neither civil nor criminal. They are "quasi judicial administrative proceedings". The referee's report is reviewed by the Board of Governors of The Florida Bar which enters a judgment. The referee may appeal from a judgment entered by the Board of Governors to the Supreme Court of Florida. See Rules 11.06 and 11.11.

[5]Rule 11.06(7) provides: "The respondent may be called as a witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues. When the respondent attorney is subpoenaed to appear and give testimony or to produce books, papers or documents, and he refuses to appear or to produce such books, papers or documents, or, having been duly sworn to testify, he refuses to answer any proper question, he may be cited for contempt of this court."

[6]Rule 1.450(a), Florida Rules of Civil Procedure, is identical with Rule 43(b), Federal Rules of Civil Procedure.

[7]A transcript of the stated objection and the referee's ruling on it is reproduced in the petition for certiorari, page 8.

guilty of the misconduct charged, but in extenuation he also found that petitioner's misconduct was the result of "a lack of appreciation of the effects of his conduct."

The Board of Governors of the Bar entered a judgment (R-5) finding petitioner not guilty of the charge in count one but guilty of the charge in count two. The Board directed that petitioner be suspended from the practice of law for 6 months, "and thereafter until he shall make restitution to his client . . . of $2,000."

Petitioner applied to the Supreme Court of Florida for review of the judgment. Briefs were filed, and the case was argued orally. Petitioner has stipulated (R-14) that no claim of constitutional privilege was specifically brought to the attention of the Supreme Court of Florida, either in his petition for review, brief, or in the argument of his counsel.

The Supreme Court of Florida affirmed the judgment of the Board of Governors except that it held that the Board did not have authority to order petitioner to make restitution of the $2,000 attorney's fee (R-6). The propriety of calling petitioner as a witness was not an issue in the Supreme Court of Florida, and the court has not passed on the question.

ARGUMENT

Nothing in the record demonstrates any reason for granting certiorari in this case since no federal question was properly raised in or decided by the Supreme Court of Florida.

No Federal Question was Involved in the Proceedings Below

The Fifth Amendment, which is absorbed in the Fourteenth Amendment, prevents a person from being "compelled in any *criminal* case to be a witness against himself . . .". The privilege may be claimed in any proceeding, regardless of its nature, but the danger which the privilege protects against is only the danger of criminal prosecution or conviction. The privilege does not exempt a witness from giving testimony which will subject him to civil liability or to professional discipline. It gives a witness the right not to disclose information which he may reasonably apprehend could be used in a *criminal* prosecution or which could lead to other evidence that might be so used. *Hoffman* v. *United States,* 341 U.S. 479 (1950). Cf. *Ullmann* v. *United States,* 350 U.S. 422, 431 (1955).

In *Spevak* v. *Klein,* 385 U.S. 511 (1967), this Court held that lawyers, like other individuals, are entitled to invoke the privilege against self-incrimination and that their privilege should not be watered down by "imposing the dishonor of disbarment and the deprivation of livelihood as a price for asserting it." Id. at 514. *Spevak* overruled *Cohen* v. *Hurley,* 366 U.S. 117 (1961). In both cases the lawyer involved was disbarred *because* he invoked the privilege. Neither case dealt with the scope of protection afforded by the privilege. *Spevak* held only that there is "no room in the privilege for classification of people so as to deny it to some and extend it to others." Id. at 516. In this case petitioner misinterprets *Spevak*. He reads it as holding that a lawyer may refuse to testify *at all* in any disciplinary proceeding against him. He assumes that *Spevak* treated disciplinary proceedings as if they were criminal prosecutions. Acceptance of petitioner's assumption would

violate the fundamental rule of *Spevak* by *creating* a classification under which lawyers would be exempt from giving non-incriminating testimony merely because disclosure could result in loss of professional status. This exemption is not now available to any other class of individuals.

In *Spevak* the Court assumed that if the petitioner had been compelled to testify, he would have disclosed information which could have subjected him to criminal penalty.[8] *Spevak* did not convert disciplinary proceedings against lawyers into criminal proceedings; it did not hold that disbarment is a criminal penalty; it did not hold that a lawyer charged with misconduct may not be called as a witness. It held merely that a lawyer has the same privilege against self-incrimination as anyone else, that he may exercise that privilege in a disciplinary proceeding, and that he may not be penalized for doing so.

The petition for certiorari does not suggest that petitioner's testimony was or could have been incriminating. Petitioner was charged only with professional misconduct. The charges were not based on conduct which could have been criminal. There was a danger that petitioner's testimony would result in professional discipline or civil liability, but in the context of the proceedings, there was no reasonable possibility that his testimony could be used in a criminal

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[8]The first footnote to Mr. Justice Harlan's dissenting opinion in *Spevak* points out that in that case no claim was made that "the underlying facts representing petitioner's alleged conduct were not such as to entitle him to claim the privilege against self-incrimination." The Court, therefore, dealt with *Spevak* on the premise that the lawyer had properly asserted his claim of privilege. In *Cohen* v. *Hurley*, 366 U.S. 117, 121 (1961), the Court noted that petitioner's claim of privilege was based on possible violations of sections of the New York Penal Law relating to soliciting and fee splitting. No similar provisions exist in Florida.

prosecution against him or that it could lead to other evidence that might be so used. Moreover, the testimony he actually gave when he took the stand did not disclose any criminal conduct on his part.

Petitioner had no privilege against giving testimony which could result only in civil liability or in disciplinary action against him as a lawyer. Therefore, under the circumstances, he had no constitutional privilege, and no federal question was involved in the proceedings below.

Petitioner Did Not Assert His Claim of Privilege

While the state may not compel the accused in a criminal case to take the stand at all, any person may be called as a witness in a civil proceeding and may be examined subject to his right not to disclose privileged matters. See *Brown* v. *United States*, 356 U.S. 148, 155 (1958). When a specific objection is made, the court must determine whether "it is evident from the implications of the question in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result." *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964), quoting from *Hoffman* v. *United States*, 341 U.S. 479, 487 (1950).

Rule 11.06(7) of the Integration Rule of The Florida Bar permits The Florida Bar to call the lawyer who is charged with misconduct as a witness. It provides that if the lawyer "refuses to appear . . . or having been duly sworn to testify, he refuses to answer any *proper* question, he may be cited for contempt (by the Supreme Court)".

The Integration Rule thus requires a respondent to appear and testify if he is called, but it provides a means of

protecting him against improper questions. If a lawyer refuses to answer any question, the issue of whether the question is "proper" must be decided, not by the referee, but by the Supreme Court. The rule thus contemplates that if a respondent lawyer refuses to answer a question, the issue of whether the question is proper can be judicially resolved. It must be assumed that if a question of privilege were brought to its attention, the Supreme Court of Florida would apply applicable constitutional principles.

While no special form of words is required for a witness to invoke the privilege, he should say enough to put the referee and the court on notice that he is claiming a constitutional right. Cf. *Quinn* v. *United States*, 349 U.S. 155 (1954). If a witness were permitted in a case like this to invoke the privilege by a general objection merely to being called as a witness, he would be insured against the success of any disciplinary action taken against him. He could, without having given The Bar or the referee any warning, proceed to testify and be confident that if he should lose his case on the merits, the judgment against him would be reversed on constitutional grounds. This would convert the privilege against self-incrimination from a shield to a sword.

When petitioner was called as a witness, his counsel made a general objection. In doing so, he did not say that petitioner was claiming any constitutional privilege. Petitioner objected merely to being called as a witness. When his objection was overruled, he took the stand and testified fully and completely. He did not take advantage of the available procedure by objecting to any question or group of questions. Under these circumstances, even if petitioner had had a constitutional privilege not to disclose particular information, he abandoned the privilege by his course of conduct.

Petitioner Waived any Error in the Proceedings Before the Referee by Failing to bring his Claim of Privilege to the Attention of the Supreme Court of Florida.

Under the Integration Rule of The Florida Bar, an attorney against whom a judgment is entered by the Board of Governors may petition the Supreme Court of Florida to review the proceedings.[9] Unless otherwise provided in the Integration Rule, the Florida Appellate Rules govern the proceedings.[10] Those rules provide that even errors which have been assigned by an appellant and thus brought to the court's attention are abandoned unless they are argued in the appellant's brief.[11]

Petitioner filed a petition for review in the Supreme Court of Florida. The case was briefed and argued orally, but petitioner never brought his claim of privilege to the court's attention. The court below has had no opportunity to pass on the claim which petitioner is making in this Court, and it has not done so. It was not presented to or in any way considered by the court below. Under the circumstances, the petition for certiorari does not comply with Rule 23(1)(f) of this Court, and petitioner's claim of privilege may not be asserted in this Court now as a ground for reversing the judgment below.[12]

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[9]Rule 11.11 of the Integration Rule.

[10]Id.

[11]Rule 3.7(i), Florida Appellate Rules.

[12]In addition, it is doubtful whether this Court has jurisdiction under 28 U.S.C., §1257, which authorizes review by certiorari of decisions rendered by the highest court of a state if "any title, right, privilege or immunity is *specially set up or claimed* under the Constitution . . .".

CONCLUSION

Petitioner has demonstrated no reason for reviewing the decision below. No federal question was involved in the state proceedings. Even if a federal question had existed, petitioner, did not claim a constitutional right, either in the proceedings before the referee or in the Supreme Court of Florida. Thus, no federal question was decided by the court below, and the petition for certiorari should be denied.

Respectfully submitted,

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